



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC APPEAL NO. 62 OF 2016

PENTAPHARM LIMITED.....APPELLANT

=VERSUS=

SOROYA INVESTMENT LIMITED.....RESPONDENT

{Being an Appeal against the Judgement delivered by the Honourable Mr.Mbichi Mboroki,Chairman, Business Premises Rent Tribunal in Tribunal Case Number 357 of 2014 on the 3rd of June 2016}.

JUDGEMENT

1. The appellant was a tenant of the respondent on the ground floor of Corner House which is at the junction of Kimanathi Street and Mama Ngina Street in the Central Business District in Nairobi. In December 2014, the respondent issued a notice to terminate the tenancy of the appellant in accordance with the provisions of the Landlord and Tenants shops Hotels and Catering Establishments Act, Cap 301 Laws of Kenya (the Act) and the appellant filed a reference to the Business Premises Rent Tribunal (BPRT).

2. The tribunal heard the matter and in a judgement delivered on 3rd June 2016, dismissed the appellant's reference and upheld the notice to terminate the tenancy. The tribunal Chairman made a further order directing that the appellant vacates the premises within 6 months failing which eviction was to issue without further reference to the tribunal. The appellant was aggrieved with the judgement of the tribunal and preferred an appeal to this Court in which it raised 16 grounds of appeal which can be summarised as follows:-

- 1. That the Chairman of the tribunal failed to appreciate that the appellant was a controlled tenant which was protected under Section 2 of the Act.***
- 2. That the chairman erred in law in upholding a defective notice which was not dated in accordance with the provisions of the Act.***
- 3. That the chairman erred in fact and in law in holding that the notice by the respondent met the threshold of Section 7 (2) of the Act.***
- 4. That the chairman erred in law and in fact in directing the appellant to vacate and deliver vacant possession of the suit premises on or before 31st December 2016 and in default thereof eviction order do issue without reference to the tribunal.***
- 5. That the chairman failed to notice that the notice to terminate the appellant's tenancy was malicious owing to the contradictory evidence given as to the reason for termination.***
- 6. That the chairman erred in law and in fact in failing to recognize that the respondent's offer of alternative space was not suitable to the appellant and that there was alternative space where the respondent's managing director would have been accommodated.***

3. I have considered the grounds of appeal, as well as the submissions by the appellant and the respondent. In dealing with an appeal from the Tribunal, this Court by virtue of the provisions of Section 15(2) of the Act is given powers conferred on the Tribunal by or under this Act in addition to any other powers conferred on it by or under any written Law. In other words I am obliged to consider the evidence adduced before the Tribunal re-evaluate it and reach my own conclusions but of course being alive to the fact that I did not see the witness testify.

4. I will deal with the grounds of appeal as summarised above one after the other. The six grounds as summarised also form the issues which are for determination in this appeal. Ground one herein has no basis and is contradictory to ground two in the memorandum of appeal. There is evidence on record that after the respondent purchased the suit premises from Kenya National Assurance Company Limited, it found the

appellant who was a tenant. There was no new lease signed between the appellant and the respondent and therefore it meant that upon expiry of the lease with the previous landlord, the relationship between the appellant and the respondent became that of a controlled tenancy and hence subject to the provisions of the Act. The learned Chairman did not make any contrary findings and therefore there is no basis for ground one which is dismissed.

5. On ground two, the appellant contends that the learned Chairman erred in holding that the notice to terminate tenancy was dated 1st December 2014; that the notice as it was, was defective in that it was not dated. I have looked at the notice and note that at the bottom of the notice, only the date and month are indicated but the year is not indicated. The appellant has argued that a notice is like a pleading and if it is not dated, it should be struck out. In support of this submissions, the appellant relied on **Republic Vs Commissioner of Lands and others Ex-parte Daphne Pauline Bagshaw & 7 others (2009) eKLR** where Justice Odero observed as follows:-

“ the provisions of this rule are very clear that every pleading must be signed by an advocate ,a recognised agent or by the party suing themselves. These provisions of this rule are mandatory in that the term used is “shall?”. Therefore any provisions which offends this rule is invalid and must be struck out. This was the finding of Justice Maraga in HCCC No. 89 of 2004 Kofexco Limited Vs Getco Limited in which the learned Judge upheld the view that a re-amended plaint which had been neither dated nor signed is no pleadings and should be struck out”.

6. In the case referred to in paragraph 5 hereinabove, the Judge was dealing with a situation where a pleading was neither dated nor signed. In the instant case, the notice to terminate tenancy was signed and the date and month was there but the year was omitted. Despite the omission of the year, the notice was clearly stamped with the Tribunal stamp which showed that it was issued on 1st December 2014. The omission of the year did not render the notice invalid as it did not mislead. The notice was in the prescribed form. It was clearly expressed to take effect on 1st February 2015, which was the minimum statutory notice period provided in the Act. When it was served upon the appellant, the appellant proceeded to file a reference on the basis that the notice was issued in 2014.

7. Section 72 of the interpretation and General Provisions Act Cap (2) Laws of Kenya provides that save as otherwise expressly provided, whenever any form is prescribed by any written law, an instrument or document which purports to be such form shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document, or which is not calculated to mislead. In the instant case, failure to indicate the year did not render the form void. The date the notice of termination was to take effect was clearly indicated as 1st February 2015. The Tribunal stamp clearly showed that the notice was issued on 1st December 2014. The omission to indicate the year 2014, at the bottom did not render the form invalid. There is nothing which shows that the omission was calculated to mislead. To this extent, I agree with the decision of Justice Odunga in **Kirima Bus Services Ltd Vs Joseph Kariuki Gichimu T/A Tausi Enterprises & Peacock Enterprises (2013) eKLR** in which he quoted with approval the decision of Muli J as he then was in the case of **Sahab Vs Hassanally (1986) KLR 371** where the learned Judge had occasion to deal with the issue of forms under Section 4(1) of the Act. I therefore find that the learned chairman of the Tribunal was correct in finding that the notice was valid and was issued on 1st December 2014. I therefore dismiss ground two.

8. On ground three, the appellant is faulting the learned Chairman that he erred by holding that the notice had met the threshold of Section 7(2) of the Act. The said section provides as follows:-

“ The landlord shall not be entitled to oppose a reference to a tribunal on the ground specified in subsection (1) (g) of this section if the interest of the landlord, or an interest which has merged in that interest and but for the merger would the interest of the landlord , was purchased or created within the five-year period preceding the date of the tenancy notice seeking to terminate the tenancy , and at all time since such purchase or creation the premises concerned have been occupied wholly or mainly for purposes of a shop hotel or catering establishment”.

9. Section 7(1) (g) of the Act provides as follows:-

“ Subject hereinafter provided , that on termination of the tenancy the landlord himself intends to occupy for a period of not less than one year the premises comprised in the tenancy for purposes , or partly for the purpose of a business to be carried on by him therein or at his residence”.

10. From the above provisions, it is clear that a landlord is only allowed to oppose a reference under Section (1) (g) if he purchased the premises 5 years preceding the issuance of termination notice and if the premises had been occupied wholly or mainly for purposes of a shop, hotel or catering establishment. In the instant case the premises were purchased by the respondent from Kenya National Assurance Co. Limited in 2008. The notice to terminate the tenancy was issued on 1st December 2014. As at the time of issuance of the notice, the premises were occupied as a shop which was operating as a chemist. The respondent had held the premises for more than five years and therefore was allowed to terminate the tenancy. I therefore find that the respondent had met the requirements of Section 7(2) of the Act. The learned Chairman properly analysed this evidence. I therefore find no merit in ground three which is hereby dismissed.

11. On ground four, the appellant is blaming, the learned Chairman for directing it to vacate the suit premises by 31st December 2016. The appellant is contending that upon the determination that the notice was properly issued, the Chairman should not have proceeded to order that the appellant vacates within 6 months that is by 31st December 2016. According to the appellant, the Chairman should have moved in accordance with Section 9 (3) (b) of the Act. The appellant is of the view that the Chairman should have ordered fresh Notice to be issued after the expiration of twelve months. With respect to counsel for the appellant, this is a wrong interpretation of Section 9(3) of the Act. This section can only apply to a case where the issue is on assessment of rent or for any other reason such as where the notice is found to be of no effect. This is when fresh notice can be given after expiry of two years in case of rent assessment or one year in any other case such as where a notice is found to be of no effect.

12. In this case, the Chairman had upheld the notice of termination of tenancy and according to section 1(C), the chairman had power to

make any further order as he thought fit. In this case, the chairman thought it fit to make a further order that the appellant do vacate the suit premises failing which an eviction order was to issue without further reference to the tribunal. The chairman was therefore within his powers to make the orders he made. I therefore find that ground four lacks merit. It is hereby dismissed.

13. On ground five the appellant faults the Tribunal Chairman for failing to notice that the respondent's notice to terminate the appellant's tenancy was tainted with malice. The basis upon which the appellant claims this is that during the hearing, the tribunal was told that the premises were required by the managing director of the respondent who was disabled and elderly and therefore required a place on the ground floor where he could access the premises on a wheelchair and that he had phobia for lifts. The appellant argued that this reason was contradictory to the submissions by counsel for the respondent who stated that the Managing Director of the respondent was old and sickly and that he was advised against travelling to Kenya from United Kingdom to come and testify. The appellant further took issue with the fact that there was no evidence that the appellant's Managing Director had the requisite work permits authorising him to work in Kenya.

14. There is evidence that the Director occasionally used to visit Kenya. However it was thought prudent to have him in Kenya for longer to enable him manage the business. The appropriate space was in the ground floor. Though there were other spaces which fell vacant on the ground floor, the position the appellant was occupying had been identified as the most ideal. It cannot therefore be argued that there was malice in the issuance of the notice. The tribunal chairman stated in his judgment that a tenant could not choose where a landlord should set up its office. The issue of work permits was not relevant at that stage. These are documents which would have been obtained once the appellant's Managing Director was in the country. I do not therefore fault the chairman in this regard. I find no merit in ground five which is hereby dismissed.

15. In ground six, the appellant is faulting the chairman for failing to recognize that the alternative accommodation which was offered to the appellant was not suitable to the appellant owing to the nature of its business. The appellant operates a pharmacy. The appellant had been offered alternative space on the 15th and 16th floors of Corner House. The appellant stated that the space offered would not have been suitable. It stated that it had other chemists which are all housed on the ground floor; that businesses based on the ground floor are easily seen by people who are walking. This may be the case and convenient to customers but there is evidence on record that there were pharmacies on 14th floor of the building and on the mezzanine floor. Though the pharmacy which was on the 14th floor has since re-located, the reason given was that they re-located because their business had expanded. The chemist on the mezzanine floor was in the same place during the proceedings at the tribunal. Whereas I agree that a chemist can be at an advantageous position if it is located in the ground floor, I am of the view that even if one is located on either the 15th and 16th floor, it does not really matter. What matters is how the owners market it by way of advertising. I do not therefore think that the offer to re-locate them to the 15th and 16th floor was out of malice. There have been chemists in the upper floors of the same building. I therefore find no merit in ground six which is hereby dismissed.

16. All in all, I find that the appellant's appeal lacks merit. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 19th day of March, 2018.

E.O .OBAGA

JUDGE

In the presence of :-

M/s Martins for the Appellant

M/s Muchama for M/s Nthiwa for Respondent

Court Assistant: Kevin

E.O .OBAGA

JUDGE